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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

NICKOLAS ANTONINETTI,

Defendant and Appellant.

D072794

(Super. Ct. No. SCD272901)

APPEAL from a judgment of the Superior Court of San Diego County, Polly H. Shamoon, Judge. Affirmed.

Appellate Defenders, Inc. and Lynelle K. Hee, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Adrian R. Contreras, Deputy Attorneys General, for Plaintiff and Respondent.

Nickolas Antoninetti pleaded guilty to one count of grand theft of property valued more than \$950 (Pen. Code,¹ § 487, subd. (a)). The trial court granted Antoninetti probation on various terms and conditions. One of the conditions of probation imposed was a so-called Fourth Amendment waiver. The condition, 6n, provides: "Submit person, vehicle, residence, property, personal effects, computers and recordable media, to search at any time with or without a warrant, and with or without reasonable cause, when required by P.O. or law enforcement officer."

Antoninetti appeals challenging only the portion of condition 6n which provides "computers and recordable media." Antoninetti contends there is no nexus for the search of electronic devices and in any event the condition is overbroad and violates the requirements of *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*). We will find the trial court correctly determined the condition was necessary to permit appropriate supervision of Antoninetti on probation. Accordingly, we will affirm the judgment.

STATEMENT OF FACTS

Since this appeal is from a guilty plea, we will accept the summary of the facts from the probation officer's report as set forth in respondent's brief.

One day in 2017, San Diego Police Department officers conducted a bait bicycle operation on the boardwalk in Pacific Beach. Two bait bicycles, equipped with GPS tracking systems, were locked to a bicycle rack. The locks were coated with a red transfer paste. One night, officers received notification the bicycles had been moved.

¹ All further statutory references are to the Penal Code unless otherwise specified.

The bicycles were tracked to appellant's location on the boardwalk. Officers found appellant with both bicycles and the cut lock and red transfer paste on his hands. Each bicycle was worth more than \$950.

In his interview with the probation department before sentencing, appellant said he was under the influence of methamphetamine during the theft.

DISCUSSION

At sentencing, defense counsel objected to the electronic portion of the search waiver in condition 6n. The principal objection was that there was no nexus for such condition in either the crime in this case or the defendant's personal history, thus the condition violated *Lent, supra*, 15 Cal.3d 481. The court overruled the objection making the following comments:

"And 6 will have in the Fourth waiver, search all media, including cell phones. In this case, the defendant stole more than one bike. It is logical to think he couldn't use more than one bike at a time; he was going to do something with the other one. And it is consistent with these types of cases that the other bikes, or maybe all of them, are sold. And you can use your cell phone to do that.

"In addition to that, not only was he under the influence in this case by his own admission, but he was on probation for two other cases where it dealt with his having either drugs or drug paraphernalia, indicating that he has a drug issue, and he's getting his drugs from someone. So given that, and the fact that he admits that his judgment was impaired by drug use, it is logically related to use of a cell phone, and it will be imposed."

The probation officer also requested the court to impose the condition so that the defendant could be properly supervised. As we will discuss, we agree with the assessments of the court and the probation officer.²

A. Legal Principles

We begin our discussion with the observation that we are aware our Supreme Court has granted review in numerous cases pending resolution of *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted February 17, 2016, S230923. However, pending further guidance from the Supreme Court we must endeavor to resolve the issues before us.

A grant of probation is an act of clemency. (*People v. Moran* (2016) 1 Cal.5th 398, 402.) The purpose of probation is to protect the public and to attempt to rehabilitate the defendant. (*Ibid.*) The trial court has broad discretion in determining which conditions of probation are necessary to accomplish the goals of probation. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.)

A condition of probation is unreasonable under *Lent*, *supra*, 15 Cal.3d at page 486, if it does three things: (1) has no relationship to the crime of which the defendant was convicted, (2) relates to conduct that is not criminal, and (3) requires or forbids conduct that is not reasonably related to future criminality. All three prongs of *Lent* must be

² Respondent urges us to find forfeiture of the issue of whether the condition is overbroad. We decline to apply forfeiture here given the extent of the defense objections made at sentencing.

shown before a reviewing court will invalidate a probation condition. (*People v. Olguin* (2008) 45 Cal.4th 375, 379-380.)

Where the condition imposes a burden on the defendant about otherwise lawful activity, it must be reasonably related to prevention of future criminal activity. (*In re P.O.* (2016) 246 Cal.App.4th 288, 295.) The fact that electronic devices were not used in the crime "is a factor, but not the only factor warranting imposition of" an electronic search condition. (*People v. Acosta* (2018) 20 Cal.App.5th 225, 232; italics omitted.)

B. Analysis

It is undisputed there is no evidence that Antoninetti used any electronic devices in the commission of the theft of two expensive bicycles. The only justification for an electronic search condition here is the probation officer's view, shared by the court, that such condition is necessary to properly supervise this defendant on probation. The justification is based on the nature of the theft of two bicycles, which the court concluded were probably going to be sold. Thefts such as the ones here would ordinarily require the thief to contact someone to sell the items. Thus, the court believed the use of electronics, including social media, are likely mechanisms for use in further theft offenses. Accordingly, both the court and the probation officer believe searches of such devices are needed to prevent future crimes of the same type.

Further justification was offered regarding Antoninetti's background of using illegal drugs. Although there was some misunderstanding of Antoninetti's criminal history at sentencing, he does not dispute he has had issues with drug use. Indeed, he claims he was under the influence of methamphetamine when he committed the current

crime. Antoninetti offered his drug use as an explanation for use of bad judgment in committing the crime. Again, the court and the probation officer reasoned that if the defendant continues with use of illegal drugs, he will have to contact someone, and the use of electronic media is a likely method of such contact. Thus, the questions here are whether the search condition is reasonably related to legitimate probation supervision and if it is narrowly tailored to accomplish its purpose without unnecessary interference with protected interests. We think the condition imposed is reasonable and sufficiently tailored.

In *People v. Trujillo* (2017) 15 Cal.App.5th 574 (*Trujillo*), review granted November 29, 2017, S244650,³ we addressed the use of the same condition, justified by the trial court's belief such condition was necessary for proper supervision of the defendant. In that case we found the condition to be reasonable and appropriately tailored. In reaching its conclusion the court said:

"After *Lent*, the California Supreme Court clarified that a probation condition 'that enables a probation officer to supervise his or her charges effectively is . . . "reasonably related to future criminality." ' (*Olguin, supra*, 45 Cal.4th at pp. 380–381, italics added; accord, *In re P.O.* (2016) 246 Cal.App.4th 288, 295 (*P.O.*)). Because the probation officer is responsible for ensuring the probationer refrains from criminal activity and obeys all laws during the probationary period, the court may appropriately impose conditions intended to aid the probation officer in supervising the probationer and promoting his or her rehabilitation. (*Olguin*, at pp. 380-381; *People v. Balestra* (1999) 76 Cal.App.4th 57, 67 (*Balestra*) ['a warrantless search condition is intended to ensure that the [probationer] is obeying the fundamental condition of all grants of probation, that is,

³ We discussed the same issues in *People v. Nachbar* (2016) 3 Cal.App.5th 1122, 1129, review granted December 14, 2016, S238210.

the usual requirement . . . that a probationer "obey all laws" '].) "This is true "even if [the] condition . . . has no relationship to the crime of which a defendant was convicted." ' (*P.O.*, at p. 295, quoting *Olguin*, at p. 380.)" (*Trujillo, supra*, 15 Cal.App.5th at p. 583.)

We are aware Courts of Appeal have offered differing views about electronic search conditions of probation. However, we think our opinion in *Trujillo* set an appropriate balance of the probationer's privacy interests and the need for adequate supervision of probationers such as Antoninetti. Pending further direction from our Supreme Court we will adhere to the views expressed in *Trujillo, supra*, 15 Cal.App.5th 574. As in that case we find the trial court properly imposed condition 6n in its grant of probation.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

IRION, J.